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No. 87-470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FORT WAYNE BOOKS, INC.,

Petitioner,

vs.

STATE OF INDIANA, *et al.*,

Respondents.

MOTION OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, AND INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., FOR LEAVE TO FILE A BRIEF, AS *AMICI CURIAE*, IN SUPPORT OF PETITIONER, AND BRIEF ATTACHED.

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Statement

The American Booksellers Association, Inc., the Association of American Publishers, Inc., the Council for Periodical Distributors Associations, and the International Periodical Distributors Association, Inc., (collectively referred to as *amici*) hereby respectfully move for leave pursuant to Rule 42 of the Rules of the Supreme Court of the United States to file the attached brief *amici curiae* in this case. The consent of the attorney for petitioner has been obtained and filed with the Court. The consent of the attorney for respondents was requested but refused.

The *Amici*

The *amici*'s members publish, produce, distribute, and sell books, magazines, and other printed materials of all types, including those which are scholarly, literary, scientific and entertaining.

The American Booksellers Association, Inc. (ABA) is the major national association of booksellers in the United States. ABA has approximately 5,200 members consisting of private book stores, department book stores, university book stores and chain book stores.

The Association of American Publishers, Inc. (AAP) is the major national association in the United States of publishers of general books, textbooks and educational materials. Its members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of the general, educational and religious books and materials produced in the United States. These works are sold and distributed in all fifty states to schools, universities and libraries and through thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities.

The Council for Periodical Distributors Associations is the national trade association for over four hundred independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state of the United States.

The International Periodical Distributors Association, Inc. is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

Interest of the *Amici*

The interest of the *amici* reflects their continuing interest in the decisions of this Court involving the balancing of First Amendment rights and restrictions on materials with sexual content. *Amici*'s brief will demonstrate how the legal principles involved in this case impact upon those who produce, distribute and sell material which is not obscene.

Although the case *sub judice* involves "adult" bookstores, the RICO statute upheld by the Indiana Supreme Court, and similar RICO statutes in other jurisdictions,[1] are by no means limited to businesses which deal primarily in sexually explicit materials. In fact the padlocking of stores and massive seizure of printed materials involved in the two cases decided below did not distinguish between obscene and First Amendment protected materials. Everything was seized. The statute is drawn so broadly that it permits the massive seizure and forfeiture of assets, including non-obscene books and periodicals, from a business that does not carry a single obscene title but is shown only to have violated provisions relating to materials deemed "harmful to minors." Such a harsh possible result obviously chills the exercise of First Amendment rights by the legitimate booksellers, distributors and publishers who are the members of *amici*.

This concern of legitimate businesses is not unwarranted. There has been rising agitation directed against booksellers, publishers and distributors handling First Amendment protected materials. *Amici* cite but a few troubling recent examples. In Alabama, the District Attorney of the City of Montgomery embarked on an unlawful campaign to coerce bookstore and newsstand owners from carrying any future issues of periodicals which he deemed objectionable, but which were adjudged to be protected by the First Amendment. See *Council for Periodical*

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[1] The Indiana RICO statute is modeled after the Federal RICO statute (18 U.S.C. § 1961 *et seq.*) and is similar to the RICO statutes of many other states.

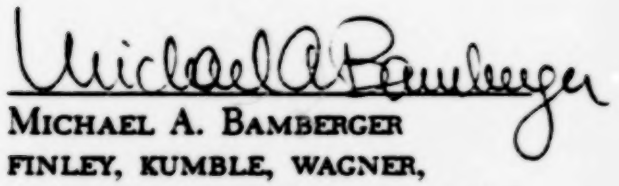
Distributors Association v. Evans, 642 F. Supp. 552 (M.D. Ala. 1986), *aff'd* 11th Cir. Nos. 86-7569, 86-7754 (Sept. 17, 1987). At the national level, the Attorney General's Commission on Pornography ("Commission") branded convenience and drug store chains as purveyors of pornography, leading to a court order requiring the retraction of the charge and advice to the recipients that earlier communications from the Commisssion were of no legal effect and to be ignored. *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581 (D.D.C. 1986). In its subsequent July 1986 report, the Commission not only endorsed broad new law enforcement initiatives, but also encouraged "private" censorship efforts as a "coercive force" to "control" the availability of materials concededly protected by the First Amendment.

In fact, in furtherance of its goals, the Commission listed as one of its recommendations that state legislatures enact RICO statutes which have obscenity offenses as predicate acts, because "RICO provides an effective means to substantially eliminate obscenity businesses." Attorney General's Commission on Pornography, *Final Report* at 435, 498 (July 1986). Although the Commission did not say so, RICO also provides an effective means to eliminate legitimate businesses which may have inadvertently crossed the gray line between what is obscene and what is not, as well as an effective means to coerce legitimate businesses into refraining from stocking or distributing First Amendment protected material which may not meet with the approval of a faction in the community.

Unless the Court reaffirms the existing doctrine relating to prior restraints, and continues to insist on adequate procedural safeguards where seizures of presumptively First Amendment protected materials are involved, RICO statutes like the Indiana law in this case will surely chill the production and distribution of a wide range of First Amendment protected materials.

In view of the foregoing, *amici* seek leave to file the attached brief.

Respectfully submitted,



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Statement

The American Booksellers Association, Inc., the Association of American Publishers, Inc., the Council for Periodical Distributors Associations, and the International Periodical Distributors Association, Inc., (collectively referred to as *amici*) submit this joint brief, *amici curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of the petitioner, Fort Wayne Books, Inc., having submitted a motion for permission to file same.

Interest of the *Amici* and Summary of Argument

The interest of the *amici* reflects their continuing interest in the decisions of this Court involving the balancing of First Amendment rights and restrictions on materials with sexual content. *Amici*'s brief will demonstrate how the legal principles involved in this case impact upon those who produce, distribute and sell material which is not obscene.

Although the case *sub judice* involves "adult" bookstores, the RICO statute upheld by the Indiana Supreme Court, and similar RICO statutes in other jurisdictions, are by no means limited to businesses which deal primarily in sexually explicit materials. In fact the padlocking of stores and massive seizure of printed materials involved in the two cases decided below did not distinguish between obscene and First Amendment protected materials. Everything was seized. The statute is drawn so broadly that it permits the massive seizure and forfeiture of assets, including non-obscene books and periodicals, from a business that does not carry a single obscene title but is shown only to have violated provisions relating to materials deemed "harmful to minors." Such a harsh possible result obviously chills the exercise of First Amendment rights by the legitimate booksellers, distributors and publishers who are the members of *amici*.

This concern of legitimate businesses is not unwarranted. There has been rising agitation directed against booksellers, publishers and distributors handling First Amendment protected materials. *Amici* cite but a few troubling recent examples. In Alabama, the District Attorney of the City of Montgomery embarked on an unlawful campaign to coerce bookstore and newsstand owners from carrying any future issues of periodicals which he deemed objectionable, but which were adjudged to be protected by the First Amendment. See *Council for Periodical Distributors Association v. Evans*, 642 F. Supp. 552 (M.D. Ala. 1986), *aff'd* 11th Cir. Nos. 86-7569, 86-7754 (Sept. 17, 1987). At the national level, the Attorney General's Commission on Pornography ("Commission") branded convenience and drug store chains as purveyors of pornography, leading to a court order

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In fact, in furtherance of its goals, the Commission listed as one of its recommendations that state legislatures enact RICO statutes which have obscenity offenses as predicate acts, because "RICO provides an effective means to substantially eliminate obscenity businesses." Attorney General's Commission on Pornography, *Final Report* at 435, 498 (July 1986). Although the Commission did not say so, RICO also provides an effective means to eliminate legitimate businesses which may have inadvertently crossed the gray line between what is obscene and what is not, as well as an effective means to coerce legitimate businesses into refraining from stocking or distributing First Amendment protected material which may not meet with the approval of a faction in the community.

Amici contend that the Indiana RICO statute and similar statutes violate the First Amendment in that they constitute an unconstitutional prior restraint on First Amendment protected materials under the doctrine first defined in *Near v. Minnesota*, 283 U.S. 697 (1931), and, further, the statutes do not include the special protections that the Court has consistently imposed with respect to the seizure of presumptively First Amendment protected material.

The Challenged Statute

The Indiana RICO statute was enacted in 1980, and is similar to the federal RICO statute, 18 U.S.C. § 1961 *et seq*. Basically, the statute provides that anyone who acquires, maintains, or participates in any business through a "pattern of racketeering activity" is guilty of "corrupt business influence," a Class C felony.

Ind. Code § 35-45-6-2. A pattern of racketeering activity is in turn defined as commission in the course of five years of two related offenses from a list of specified offenses. Ind. Code § 35-45-6-1. As interpreted by the Indiana Supreme Court, conviction for the offenses is not required. *4447 Corporation v. Goldsmith*, 504 N.E.2d 559, 566 (Ind. 1987). The list of offenses includes all Indiana obscenity law crimes. These crimes include not only importation or sale of obscene matter (Ind. Code § 35-49-3-1), but also disseminating to minors matter harmful to minors, displaying matter harmful to minors in an area to which minors have visual, auditory or physical access, or displaying for sale matter harmful to minors within 500 feet of a church or school. (Ind. Code § 35-49-3-3). In addition to the criminal penalty, the State may invoke the full panoply of civil sanctions contained in Indiana Code Sections 34-4-30.5-1 through 30.5-4.

The civil remedies available for a violation of the Indiana RICO law are severe. They include forfeiture of any property derived from or used in the course of the RICO violation. Ind. Code § 34-4-30.5-3. Property may even be seized for forfeiture, and placed under seal or removed, by an officer on *ex parte* court order up to 180 days prior to the filing of any formal adversary forfeiture action. Ind. Code § 34-4-30.5-4. In this case, the entire contents of three bookstores were seized, without even an *ex parte* review of most of the material, which included First Amendment protected materials. In fact, the Indiana Supreme Court stated it to be "irrelevant" whether the assets seized and forfeited were obscene or not. 504 N.E.2d at 564. In addition, the Court may, on the bringing of an action to enjoin a violation, issue an injunction "prohibiting a defendant from engaging in the same type of endeavour as the enterprise in which he was engaged in violation of" the RICO law. Ind. Code § 34-4-30.5-2.

An injunction will be granted on a showing by a preponderance of the evidence that a RICO violation has occurred. Similarly, property may be civilly forfeited on a showing by a preponderance of the evidence that the property was derived from or used in the course of a RICO violation. Thus,

massive forfeitures of property and injunctions against engaging in similar businesses in the future may be effected even without any criminal conviction on the triggering violations, which, of course, would require proof beyond a reasonable doubt. As described by the Indiana intermediate appellate court, the RICO statute permits "seizure orders of indefinite duration and create[s] a remedy of permanent forfeiture which would extend to protected materials and neutral instrumentalities." *4447 Corporation v. Goldsmith*, 479 N.E.2d 578, 590 n. 8 (Ind. Ct. App. 1985).

REASONS FOR GRANTING THE WRIT

THE INDIANA RICO STATUTE CONSTITUTES AN UNCONSTITUTIONAL PRIOR RESTRAINT WHEN APPLIED BASED ON PREDICATE OFFENSES RELATING TO PRESUMPTIVELY FIRST AMENDMENT PROTECTED MATERIAL. IN LIGHT OF THE NUMBER OF JURISDICTIONS WITH SIMILARLY UNCONSTITUTIONAL PROVISIONS, THE ISSUE SHOULD BE RESOLVED BY THE COURT

The Indiana RICO statute provides for pre-judgment seizure and subsequent forfeiture of "any property used in the course of, intended for use in the course of, derived from, or realized through" a RICO violation. Ind. Code §§ 34-4-30.5-3 and 30.5-4. The overwhelming majority of books in a typical bookstore are not obscene, and most could not be deemed harmful to minors. Nevertheless, if over a five year period a store twice sold books judged by a particular community to be obscene, or sold to two minors books deemed harmful to those minors, or even, under the Indiana law, merely displayed two books harmful to minors in an area accessible to minors, the entire inventory of the store and all of its assets would be subject to forfeiture.[1] The store

[1] It may, in fact, subject the assets of an entire chain of stores to seizure and forfeiture. In a recent federal RICO indictment brought in the Eastern District of Virginia, forfeiture of a chain of video stores was sought. *United States v. Pryba*, No. CR 87-00208-A.

would thus be prevented from distributing the protected materials which at all times constituted the vast majority of its business. The intent and obvious effect of this forfeiture provision (as demonstrated by its enforcement in this case and its companion cases below) is to cause a forfeiture of the entire business enterprise through which the violation was committed, and thereby prevent the individuals involved from continuing in the same general line of business. Ind. Code § 34-4-30.5-2 (2) lends further support to this construction, since it expressly authorizes a court to issue an injunction prohibiting a defendant from engaging in a similar business. Where the predicate offense relates to sexually explicit materials and when the business is a bookstore, chain of stores, distributor of written materials, or publisher, this clearly constitutes a prior restraint violative of the First Amendment. The Court has clearly stated that "[a]ny system of prior restraint, however, 'comes to this Court bearing a heavy presumption against its constitutional validity.' *Bantam Books, Inc. v. Sullivan*, 372 U.S., at 70; *New York Times Co. v. United States*, 403 U. S., at 714; *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. Princess Anne*, 393 U. S. 175, 181 (1968); *Near v. Minnesota ex rel. Olson*, 283 U.S., at 716. The presumption against prior restraints is heavier – and the degree of protection broader – than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable. See *Speiser v. Randall*, 357 U.S. 513 (1958)." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-559 (1975) (quoted with approval in *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n. 13 (1980)).

The prior restraint imposed in this case and generally permitted under the Indiana and other similar RICO statutes is virtually identical to that struck down by the Court over 50 years ago in *Near v. Minnesota*, 283 U.S. 697 (1931). The statute in

Near authorized enjoining a person who published an obscene or defamatory periodical from further publication of the periodical.

Consistently since *Near* it has been clear that one cannot be punished for speech by the prohibition of future speech. See, *e.g.*, *City of Paducah v. Investment Entertainment, Inc.*, 791 F.2d 463 (6th Cir.), *cert. denied*, 107 S. Ct. 316 (1986); *Gayety Theaters, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F. Supp. 777 (D. Utah 1980). Nor does the fact that the conduct is labeled "racketeering" strip away the protection of the First Amendment any more than labelling speech or speakers as "Nazi" (*Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied* 439 U.S. 916 (1978)); "Communist" (*De Jonge v. Oregon*, 299 U.S. 353 (1936)); anti-semitic (*Near v. Minnesota, supra*); or "subordinators of women" (*Hudnut v. American Booksellers Association*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 106 S. Ct. 1172 (1986)) does so.

Books and periodicals are not the equivalent of drugs and gambling. For one thing, the former are presumptively First Amendment protected. For another, a drug can objectively be determined to be such. Whether a book is obscene, on the other hand, involves subjective determinations. Thus, the problem for *amici's* bookseller, distributor and publisher members is compounded by the difficulty of applying the *Miller* standard from community to community: As the Court has said, "The line between speech unconditionally guaranteed and speech which may be legitimately regulated, suppressed or punished is finely drawn." *Speiser v. Randall*, 357 U.S. 513, 525 (1959). "[C]onstitutionally protected expression . . . is often separated from obscenity only by a dim and uncertain line." *Bantam Books v. Sullivan*, 378 U.S. 58, 66 (1963). The line becomes even dimmer and less certain when the "harmful to minors" standard of *Ginsberg v. New York*, 390 U.S. 629 (1968), is at issue, since such material by definition is First Amendment protected and has serious literary, artistic, political, or scientific value.

Finally, in calculating the chill which this statute must cast on legitimate booksellers, distributors, and publishers, the harsh

and heavy-handed seizure and forfeiture penalties are relevent. Booksellers, distributors and publishers can ill afford to lose everything because of errors of judgment as to what one community may deem "obscene" or "harmful to minors." To avoid this death penalty on their businesses, cautious businessmen are likely to avoid any works which may be considered by anyone to be obscene, harmful to minors, or simply controversial.

The First Amendment's purpose, however, was to encourage and foster open expression of all views, including those which may be unpopular or opposed by a segment of a community. To carry out this aim, the prior restraints and draconian penalties authorized here must fall before the First Amendment.[2]

The Indiana RICO statute is also unconstitutional and should also be invalidated for failure to comply with the Court's prior rulings imposing procedural safeguards on the seizure of presumptively First Amendment protected materials.

Under the statute, property may be seized for forfeiture up to 180 days before any forfeiture action is even commenced. Ind. Code § 34-4-30.5-4. Furthermore, when the forfeiture proceeding is eventually filed, the statute imposes no fixed time limit for judicial resolution of the action, and does not even urge that resolution be prompt. This open-ended period of seizure, based on a mere probable cause showing, violates the requirement that "any restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." *Freedman v. Maryland*, 380 U.S. 51, 59 (1965). See also *Vance v. Universal Amusement Co., supra*. Because the statute contains no guidelines requiring a prompt

[2] The provisions authorizing enjoining a defendant from continuing to engage in his line of business (Ind. Code § 34-4-30.5-2(2)) or ordering him to divest himself of his interest in a business (Ind. Code § 34-4-30.5-2(1)) are, for the same reasons, violative of the First Amendment when applied to creators or disseminators of protected speech.

judicial determination,[3] it may not constitutionally be employed to seize presumptively protected speech for forfeiture based on alleged obscenity law violations.

[3] In fact, in this case bookstores were padlocked, all of the books, shelves, cash registers, etc., contained in the stores were seized, and no trial was ever held.

CONCLUSION

The efforts of *amici's* members to promote the free exchange of ideas envisioned by the First Amendment requires a climate unhindered by fear of massive seizures and forfeitures of assets and inventories. The Court has consistently protected this climate by prohibiting prior restraints and strictly regulating permissible seizures. A prior restraint in the guise of a criminal racketeering law is, nonetheless, a prior restraint. Books and periodicals are not the equivalent of drugs and gambling. The First Amendment and the decisions of the Court have consistently given protected speech preferred status.

For the reasons set forth above, we respectfully urge this Court to grant a writ of certiorari to, and reverse the order of, the Supreme Court of Indiana.

Dated: October 30, 1987

Respectfully submitted,

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